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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 259

S. D. TILNEY, W. C. HAM, et al.,
Petitioners,

vs.

CITY OF CHICAGO, a voluntary Municipal Corporation, and Others, Individually and as Trustees,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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CHAMPLIN-SEGALY COMPANY, CHICAGO 365

INDEX.

	PAGE
Argument	5-29
Contested issues	1-2
Propositions of law and citations of authorities	2-5

Summary of Argument.

A.

THE PLAINTIFFS HAVE NO INTEREST IN THE TRACTION FUND OF THE CITY OF CHICAGO BECAUSE THEY HAVE NOT CONTRIBUTED THERETO, NOR WAS IT ESTABLISHED FOR THEIR BENEFIT BY THE CONTRACTING PARTIES.

The traction fund is composed of 55 per cent of the net receipts of the companies operating street railways in the City of Chicago paid to the city pursuant to the traction ordinances of 1907. The car riders did not contribute directly or indirectly to the traction fund. They merely paid the lawfully established fares to the street railway companies. The street railway companies paid the 55 per cent of the net receipts as compensation for the use of the streets of the city. The car riders have no interest in the compensation so paid.

The only theory upon which the car riders can claim any interest in the traction fund is the third party beneficiary doctrine. This doctrine applies only where the contract to which the plaintiff is not a party affirmatively discloses an intention that the plaintiff is a direct and primary beneficiary. In the case at bar the plaintiffs are not even incidentally benefited.

If plaintiffs feel that the rate of fare which they are called upon to pay is excessive and illegal, their sole remedy is to institute proper proceedings before the Illinois Commerce Commission requesting a reduction in the rate of fare 5-20

B.

THE CASES CITED BY PLAINTIFFS TO ESTABLISH THEIR RIGHT TO MAINTAIN A CLASS SUIT DEAL WITH SITUATIONS WHERE THE PLAINTIFFS OWNED A TRUST FUND IN COMMON WITH OTHERS AND THEREFORE ARE NOT APPLICABLE TO THE CASE AT BAR.

All of the cases cited by plaintiffs involve situations where trust funds were unquestionably involved and where the plaintiffs were unquestionably members of the class of beneficiaries. The holdings in these cases are not disputed, but are considered inapplicable unless plaintiffs can prove that they are beneficiaries of a trust fund held by the defendants 20-21

C.

THE MOTION OF THE PLAINTIFFS FOR RELIEF PENDENTE LITE WAS PREMATURE, PARTICULARLY WITH RESPECT TO AN ALLOWANCE FOR ATTORNEYS' FEES.

In so far as the blanket motion for relief *pendente lite* seeks discovery, it is premature and improper. After the defendant has filed an answer, the Federal Rules of Civil Procedure provide for appropriate and specific motions to discover matter not disclosed by the answer: to-wit, Interrogatories to Parties; Discovery and Production of Documents; and Requests for Admission.

In so far as the motion relates to an allowance of attorneys' fees and expenses of conducting litigation, it is also premature because the allowance of such fees and expenses cannot be made until successful termination of the litigation and the bringing of a fund into the custody of the court..... 21-26

D.

ALL OF THE EXPENDITURES MADE OR PROPOSED TO BE MADE WHICH ARE SPECIFICALLY DESCRIBED IN THE COMPLAINT ARE WITHIN THE PURPOSES PRESCRIBED BY THE FRANCHISE ORDINANCES.

A considerable portion of the complaint is devoted to general allegations which are not proper bases for sustaining this action. The expenditures made or proposed to be made which are specifically described in the complaint are for purposes falling within the terms of the franchise ordinances limiting the use of the traction fund for the purchase and construction of street railways. The Supreme Court of Illinois has held that these purposes embrace the purchase and construction of surface, elevated and underground street railways and preliminary and incidental work in connection with actual or proposed purchase and construction. The expenditures specifically complained of fall within the scope of permissible expenditures 26-28

CONCLUSION.

The named plaintiffs do not possess a *bona fide* interest in the traction fund of the City of Chicago. The suit was undoubtedly conceived and brought by the attorney for the plaintiffs for the purpose of manufacturing a basis for a claim for attorneys' fees in the remote contingency of success in proving alleged misappropriations 29

AUTHORITIES CITED.

Statutes:

Subway Act, Section 4, Ill. Rev. Stats. 1941, chap. 24, section 70-4 7
Federal Rules of Civil Procedure, Rules 33, 34, 36, 37 4

List of Cases:

Altschuler v. Chicago City Bank & Trust Co., 380 Ill. 137, 43 N. E. (2) 673 (distinguished)..... 17
Attorney General v. Corporation of Dublin, 1 Bligh, New Reports, House of Lords, 312, 339, 348-349 (distinguished) 16
Barsaloux v. City of Chicago, 245 Ill. 598 ..... 6, 27
Becht v. Miller, 279 Mich. 629, 273 N. W. 297..... 25
Blacker v. Kitchen Brothers Hotel Company, 133 Neb. 66, 273 N. W. 838 26
Board of Commissioners of Vanderburgh County v. Sanders, 30 N. E. (2) 713 (distinguished)..... 22
Buell v. Kanawha Lumber Corp., 201 Fed. 762, 769. 24-25
Carbon Steel Co. v. Slayback, 31 Fed. (2) 702 (C. C. A. Fourth Circuit) 25
Carson Pirie Scott & Co. v. Parrett, 346 Ill. 252, 257, 258, 178 N. E. 478 8-9
Chicago Railways Co. v. City of Chicago, 292 Ill. 190 12
Chicago Railways Co. v. I. C. C., 277 Fed. 970, 979 14
Dudick v. Baumann, 349 Ill. 46, 49 10-12
Electric Supply Co. v. City of Muskogee, 171 Okla. 130, 42 P. (2) 140 ..... 8, 10
Hall v. State of Wisconsin, 103 U. S. 105 (distinguished) 17
Harris Trust & Savings Bank v. Chicago Railways Co., 39 Fed. (2) 958 14
In Re A. C. Becken Co., 75 Fed. (2) 681, 685..... 9
In Re Gubelman, 13 Fed. (2) 730, 731..... 9

In Re Lear's Estate, 204 Ia. 346, 312 N. W. 244.... 25
In Re United Cigar Stores Co., 70 Fed. (2) 313.... 9
New Orleans v. Warner, 175 U. S. 120 (distinguished) 16
People v. City of Chicago, 349 Ill. 304..... 7, 27
People v. Holten, 304 Ill. 394, 399.....23-24
Price v. City of Mattoon, 364 Ill. 512, 515.....12-13
Root v. City of Saratoga Springs, 218 N. Y. S. 204, 206, 218 A. D. 237 ..... 8, 9
Styles v. Long Co., 70 N. J. L. 301, 57 Atl. 448..... 8, 9
Venner v. Chicago City Railway Co., 236 Ill. 349, 363, 86 N. E. 266, 271 14
Wall v. Chicago Park District, 378 Ill. 81 (distinguished) 17
Warner v. New Orleans, 167 U. S. 467 (distinguished) 16
Warren v. Palmer, 310 U. S. 132 (distinguished).. 22

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MAY IT PLEASE THE COURT:

The respondents, City of Chicago, *et al.*, oppose the petition for certiorari on the following grounds:

THE CONTESTED ISSUES.

The contested issues in this case are:

(1) Whether plaintiffs herein, named, or unnamed, have any interest in the traction fund of the City of Chicago to maintain an action at law or in equity.

(2) Whether the expenditures specifically charged in the complaint constitute a misapplication of moneys in the traction fund.

(3) Whether plaintiffs' motion for relief *pendente lite* is proper in any event.

(4) Whether the Federal Courts should entertain this suit which presents issues of purely local concern that only the State courts can definitely decide.

PROPOSITIONS OF LAW RELIED ON AND CITATION OF CASES.

A.

The plaintiffs have no interest in the traction fund of the City of Chicago because they have not contributed thereto nor was it established for their benefit by the contracting parties.

Price v. City of Mattoon, 364 Ill. 512, 515.

Carson Pirie Scott & Co. v. Parrett, 346 Ill. 252, 257, 258, 178 N. E. 478.

Venner v. Chicago City Railway Co., 236 Ill. 349, 363, 86 N. E. 266, 271.

Barsaloux v. *City of Chicago,* 245 Ill. 598.

People v. *City of Chicago,* 349 Ill. 304, 343.

Root v. *City of Saratoga Springs,* 218 N. Y. S. 204, 206; 218 A. D. 237.

Electric Supply Co. v. *City of Muskogee,* 171 Okla. 130, 42 P. (2) 140.

Styles v. *Long Co.,* 70 N. J. L. 301; 57 Atl. 448.

In Re A. C. Becken Co., 75 Fed. (2) 681, 685.

In Re United Cigar Stores Co., 70 Fed. (2) 313.
In Re Gubelman, 13 Fed. (2) 730, 731.
Dudick v. *Baumann,* 349 Ill. 46, 49.
Chicago Railways Co. v. *City of Chicago,* 292 Ill. 190.
Chicago Railways Co. v. *I. C. C.,* 277 Fed. 970, 979.
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Warner v. *New Orleans,* 167 U. S. 467; (distinguished).
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Altschuler v. *Chicago City Bank & Trust Co.,* 380 Ill. 137, 43 N. E. (2) 673; (distinguished).
Hall v. *State of Wisconsin,* 103 U. S. 105; (distinguished).
Wall v. *Chicago Park District,* 378 Ill. 81; (distinguished).

B.

The cases cited by plaintiffs to establish their right to maintain a class suit deal with situations where the plaintiffs owned a trust fund in common with others and therefore are not applicable to the case at bar.

(See argument.)

C.

The motion of the plaintiffs for relief pendente lite was premature particularly with respect to an allowance for attorneys' fees.

People v. Holten, 304 Ill. 394, 399.

Buell v. Kanawha Lumber Corp., 201 Fed. 762, 769.

Blacker v. Kitchen Brothers Hotel Company, 133 Neb. 66, 273 N. W. 838.

Federal Rules of Civil Procedure, Rules 33, 34, 36, 37.

Carbon Steel Co. v. *Slayback,* 31 Fed. (2) 702 (C. C. A. Fourth Circuit).

Becht v. *Miller,* 279 Mich. 629, 637, 273 N. W. 297.

In re Lear's Estate, 204 Ia. 346; 312 N. W. 244.

Warren v. *Palmer,* 310 U. S. 132 (distinguished).

Board of Commissioners of Vanderburgh County v. *Sanders,* 30 N. E. (2) 713 (distinguished).

D.

All of the expenditures made or proposed to be made which are specifically described in the complaint are within the purposes prescribed by the franchise ordinances.

Barsaloux v. *City of Chicago,* 245 Ill. 598.

People v. *City of Chicago,* 349 Ill. 304.

ARGUMENT FOR APPELLEES.

A.

The plaintiffs have no interest in the traction fund of the City of Chicago because they have not contributed thereto nor was it established for their benefit by the contracting parties.

The entire case rests upon the construction and effect of two paragraphs of the traction ordinances of 1907 which admittedly constitute contracts between the City of Chicago and the various traction companies operating as the Chicago Surface Lines. These paragraphs appear at page 8 of the transcript and are quoted at page 9 of the Petition for Writ of Certiorari. For the convenience of the Court and for a ready understanding of the argument to follow, we repeat these two paragraphs at this point:

> "Division of Remaining Net Receipts.
>
> After the deduction from the gross receipts of the items hereinbefore in this section provided, the amount remaining shall be considered as the net receipts for such year arising from the operation of the street railway system hereby authorized, and shall be divided between the Company and the said City in the following proportions: forty-five (45) per cent to be retained by the Company and fifty-five (55) per cent to be paid forthwith by the Company to the said City, crediting thereon all amounts paid out during the preceeding year by the Company for license fees, if any, exacted from the Company and employes.

> "It is further provided that, subject to the action of the City Council of said City, the said City shall deposit the amount so paid to the said City to the credit of a separate fund to be kept and used for the purchase and construction of street railways by said City; but any failure to comply with this provision shall in no way affect the rights or obligations of the Company under this ordinance."

It is to be observed that under these provisions of the ordinances the fifty-five per cent of the net receipts from the operation of the street railway system is agreed to be paid by the traction companies. The car riders are not obligated to pay these moneys and it is undisputed that they did not pay the same. The only contention which is made by the plaintiffs is that indirectly and remotely part of the fares paid by the plaintiffs to the companies found their way into the traction fund.

It is further to be observed that the only conditions attached to the creation of this fund are that it is to be kept in a separate fund and used for the purchase and construction of street railways by the city. The car riders who compose the class on behalf of whom the complaint in this case is filed are not named or described in the ordinances nor are the provisions of the ordinances relating to the traction fund expressly or impliedly made for the benefit of the car riders.

The nature of the traction fund and the scope of the purposes for which it may be used may be gathered from decisions of the Supreme Court of Illinois construing the provisions of the ordinances and from pertinent statutory provisions. In *Barsaloux* v. *City of Chicago,* 245 Ill. 598 the court in construing the words "purchase and construction of street railways" as used in the franchise ordi-

nances held that "street railways" properly construed mean elevated, surface or underground railways and that accordingly there was no valid objection to using the traction fund for the purpose of acquiring or constructing subways in the streets of the city. It was further held that the power to construct necessarily includes the power to take the preliminary steps looking toward a construction of the subway. In that case expenditures for investigations into the desirability of constructing subways was under attack.

In *People* v. *City of Chicago,* 349 Ill. 304, the Supreme Court of Illinois again had occasion to consider the provisions of the franchise ordinances relating to the traction fund. In that case the validity of the comprehensive traction ordinance passed in 1930 was attacked. Section 9 of the ordinance permitted the use of the traction fund for the construction of the contemplated subways. (See page 343.) The court held that this use of the traction fund was proper, not only upon the strength of the decision in *Barsaloux* v. *City of Chicago,* 245 Ill. 598, but also by virtue of section 4 of the Subway Act (Ill. Rev. Stats. 1941, chap. 24, sec. 70-4) which expressly authorizes the use for subway purposes of special funds accumulated from money received by the municipality from street railroad companies.

The claim of ownership of the moneys in the traction fund forms the basis of the entire argument of the petitioners. This premise, however, is nowhere proved by the facts or by citation of authority construing similar provisions in ordinances or other agreements. It appears clearly, however, from a reading of the provisions of the ordinances that this premise is utterly without foundation.

The assertion of ownership by the car riders in this fund appears to be in defiance of fundamental principles relating to third party beneficiaries under contracts.

It is undisputed that the plaintiffs are not direct parties to the franchise ordinances establishing the traction fund. Plaintiffs necessarily must and do rely upon the third party beneficiary doctrine to assert an interest in the performance of the pertinent provisions of the ordinances (see Petition for Writ of Certiorari, page 38 under Point A-4).

An examination of the cases delineating the scope of this principle reveals that the plaintiffs, if they have any interest at all, are benefited so remotely that they do not fall within the doctrine permitting suit by a stranger to the contract.

To begin with, it is axiomatic that strangers to a contract cannot sue for a breach thereof where the contract is not made for their express benefit.

> *Root* v. *City of Saratoga Springs,* 218 N. Y. S. 204, 206; 218 A. D. 237.
> *Electric Supply Co.* v. *City of Muskogee,* 171 Okla. 130, 42 P. (2) 140.
> *Styles* v. *Long Co.,* 70 N. J. L. 301; 57 Atl. 448.

The determination of whether the contract is made for the benefit of a third party so as to entitle him to bring suit is made in conformity with the following principles accepted by both Illinois and Federal Courts:

In *Carson Pirie Scott & Co.* v. *Parrett,* 346 Ill. 252, 178 N. E. 478, the Supreme Court of Illinois said (p. 257):

> "The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him

arising from the contract; if incidental he has no right of recovery thereon. * * *

"The rule is, that the right of a third party benefited by a contract to sue thereon rests upon the liability of the promisor, and this liability must affirmatively appear from the language of the instrument when properly interpreted and construed." (p. 258.)

The foregoing principles were approved in *In re A. C. Becken Co.*, 75 Fed. (2) 681, 685. See also to the same effect, *In re United Cigar Stores Co.*, 70 Fed. (2) 313 and *In re Gubelman*, 13 Fed. (2) 730.

In the last cited case the court said (p. 731):

"* * * it must appear that the parties intended to recognize the third person as the primary party in interest. It is insufficient if the third person is a mere beneficiary, having no direct interest in the performance of the stipulations of the parties."

Illustrative cases involving contracts between municipalities and a second party where incidental third party beneficiaries were denied the right to sue are:

Root v. *City of Saratoga Springs*, 218 N. Y. S. 204, 206; 218 A. D. 237.

The court held that a pedestrian injured by failure of the city to perform its contract with a property owner to care for sidewalks could not sue as a third party beneficiary.

Styles v. *R. Long Co.*, 70 N. J. L. 301; 57 Atl. 448.

It was held that where the defendant contracted with the county authorities to provide and maintain a bridge, a member of the public using the bridge was only incidentally benefited by the contract and could not sue the

defendant for alleged negligence amounting to a breach of contract.

Electric Supply Co. v. *City of Muskogee,* 171 Okla. 130; 42 P. (2) 140.

The defendant municipality had an agreement with a building contractor whereby the city agreed to pay the contractor for material used and work done. It was held that a subcontractor had no right under the third party beneficiary doctrine to sue the city for materials furnished.

In the foregoing discussion it is assumed for the purpose of argument that the provisions of the ordinances creating the traction fund are for the incidental benefit of the plaintiffs. Actually such is far from the case, and the real objection to the present suit is that the plaintiffs do not have any interest whatsoever in the traction fund and are not even incidental beneficiaries. Under the terms of the ordinance the traction fund is to be "kept and used for the purchase and construction of street railways by said city." This provision is clearly for the mutual benefit of the contracting parties. The only interest of the riding public in the street railway system whether owned by private companies or by the city is to secure adequate service at reasonable rates.

Since the case at bar purports to be a representative suit seeking relief based upon alleged misappropriation of funds, taxpayers' suits to enjoin a misappropriation of funds or to compel an accounting of public funds are analogous and the principles obtaining in such suit are applicable here. A very instructive case is *Dudick* v. *Baumann,* 349 Ill. 46. In that case a general taxpayer of the Village of Niles filed a suit seeking, among other relief, an accounting by the Village Collector of certain fees he had

deducted from assessments collected pursuant to proceedings under the Local Improvement Act. No showing was made that the plaintiff was the owner of property assessed in any of the proceedings. A decree dismissing the complaint on the ground that the plaintiff could not show any interest in these funds was affirmed by the Supreme Court of Illinois.

In its opinion the court enunciated the following principles which are equally applicable to the case at bar (p. 49):

> "The right of a tax-payer to prevent misappropriation of public funds has always been recognized by this court on the grounds that in equity tax-payers are considered the owners of the property of the municipality, and whenever public officials threaten to pay out general public funds for a purpose unauthorized by law, or misappropriate such funds, and thereby cause taxes to be levied to make good the misappropriation, equity will assume jurisdiction to prevent such unauthorized act, as the tax-payers' right in such case is not recognized by courts of law. (*Fergus* v. *Russel,* 270 Ill. 304; *Jones* v. *O'Connell,* 266 *id.* 443; *Burke* v. *Snively,* 208 *id.* 328; *Beauchamp* v. *Kankakee County,* 45 *id.* 274; *Colton* v. *Hanchett,* 13 *id.* 615.) The interest of the general tax-payer, however, must be based upon the right of the municipality in and to the funds. Special assessment funds are raised for the purpose of paying for the local improvement. The only interest which the city or village has in such funds, other than the right to be reimbursed therefrom for costs advanced, is to see that they are properly collected and used to pay for the improvement or bonds issued therefor. After the discharge of the expense of the improvement and the cost of collection, the balance, if any, belongs to the property owners against whose property it was assessed and should be returned to them. *Donahue* v. *Village of LaGrange,* 263 Ill. 607.
>
> "* * * The general rule is that a bill of complaint must show that the complainant has an interest in the

> subject matter of the suit. A mere contingent or possible interest, or probability of future interest, is insufficient. (*Green* v. *Grant,* 143 Ill. 61; I Puterbaugh's Ch. Pl. (7th ed.) p. 75; 10 R. C. L. sec. 173.) No facts showing such an interest have been alleged in the bill. Appellant is not one of those whose property has been assessed and is therefore not interested in the disposition of the assessments collected, unless a situation arises which would lead to a misappropriation of public funds and necessity for levying taxes to meet obligations of the village because of such misappropriation. He makes no such showing."

So it is here. Plaintiffs, as car riders, have no interest in the fund. They are not contributors to that fund. All that they have done is to pay fares established by law through the instrumentality of the Illinois Commerce Commission. (*Chicago Railways Co.* v. *City of Chicago,* 292 Ill. 190.) They are in no position to question the expenses of operation of those companies, one of the items being the payment of fifty-five per cent of the net receipts to the city. The traction fund was not created for the benefit of the plaintiffs. The disbursements of the monies in that fund could not possibly affect the plaintiffs. It could not affect the rate of fare which they would be required to pay in the remote contingency that they might return to the city in the future and have occasion to use the street cars.

Closely analogous to the case at bar is *Price* v. *City of Mattoon,* 364 Ill. 512. In that case a taxpayers' suit was filed to restrain the City of Mattoon and others from financing and constructing a water works purchase-and-improvement program instituted by the municipality. The cost of the water works was to be paid solely out of revenue from the sale of water. The plaintiffs were users of water and the money they paid would therefore automatically be used

to pay the bonds. This is similar to the instant situation where the fares paid by the car riders indirectly find their way into the traction fund to be used for the purchase and construction of street railways. The court held that under these circumstances plaintiffs failed to show an interest entitling them to question the accounts of the municipality (p. 515):

> "Aside from the fact that plaintiffs, as taxpayers, have failed to make out a case cognizable in a court of equity, they have also failed to show by their amended complaint any other ground for equitable interference. Should plaintiffs as water users, aside from their status as tax-payers, fail to pay the established water rates fixed by the city from time to time and be deprived of water service, no especial injury or interest is established at this time due to any apprehension or anticipation that such an event will occur. Their amended complaint fails to contain any allegations of water rates determined by the city. No failure to pay any existing rate is asserted. The city is not shown to have shut off or threatened to shut off the water from their property. As their rights as water users are purely contractual, they can avail themselves of adequate remedies at law if and when their conjectured injuries materialize."

This decision supports the assertion which we have heretofore made that the present situation resolves itself into two distinct contractual relations—one between the traction companies and the city in which the plaintiffs have no concern and the second between the traction companies and the plaintiffs relating to the payment of the fare and the contract of carriage. If plaintiffs feel themselves aggrieved concerning the rate of fare which they are called upon to pay, their sole remedy is to institute proper proceedings before the Illinois Commerce Commission requesting a reduction in the rate of fare. They have no more right to seek relief from the city on the ground that

they have allegedly been overcharged in the matter of paying fares than they have to demand an accounting from the federal government because of income taxes paid by the traction companies or to demand an accounting from the County of Cook because of property taxes paid or to demand an accounting from other creditors of the traction companies because of monies received by them from the traction companies.

In the final analysis, the fifty-five per cent net receipts is simply compensation paid to the City of Chicago for the use of its streets by the traction companies. The Supreme Court of Illinois has squarely so held in *Venner* v. *Chicago City Railway Co.*, 236 Ill. 349, 363; 86 N. E. 266, 271. A special federal court in this circuit consisting of Evans and Page, Circuit Judges and Carpenter, District Judge, has also so held. (*Chicago Railways Co.* v. *I. C. C.*, 277 Fed. 970, 979.) It has also been so held by the District Court for the Northern District of Illinois, Eastern Division, in *Harris Trust & Savings Bank* v. *Chicago Railways Co.*, 39 Fed. (2) 958. These authorities completely refute the assertion made by petitioners on page 14 of their petition that the city as a municipality gave no consideration for the fifty-five per cent fund because of the various deductions provided for before determination of the "net receipts." We do not quite understand the purpose of the petitioners in making this assertion, but in any event it is unfounded.

It is difficult to understand the theory upon which a patron of a public utility can claim an interest in compensation paid by the utility to a municipality as compensation for the use of its streets. Certainly if the compensation went into the general funds of the city, plaintiffs could claim no interest. An interest is not created

merely because the city agreed to a limited use of that compensation unless it can be shown, which cannot be done here, that a direct benefit to the patrons of the traction companies was intended.

There are no authorities cited in petitioners' brief to support the essential propositions of law asserted by them or which refute the principles laid down by the authorities hereinabove cited by us. Thus, the first main point made by petitioners at page 40 of their brief is that the defendants have received and hold trust funds for the use of the plaintiffs who are beneficial owners of these funds. No authorities are cited to support this assertion which goes to the very heart of the action. As we have already pointed out the plaintiffs herein, named or unnamed, have made no contribution to the traction fund and are not parties to any contract directly or indirectly making them beneficiaries of the monies in that fund.

A second point made by petitioners at page 37 of their brief is that the defendants voluntarily became trustees to collect the funds in question with the power and duty to invest only in street railways at Chicago. We may concede for the purpose of argument, that the traction fund is a trust fund in the sense that the monies are to be used only for the purposes prescribed by the franchise ordinances. This concession does not, however, establish the plaintiffs as beneficiaries of the trust fund nor does it establish the right of the plaintiffs to enforce the performance of whatever duties the city may have assumed with respect to that fund. The cases cited by the petitioners in support of this point (brief, pp. 37-38) present situations where the plaintiffs therein were clearly beneficiaries by virtue of express agreement or statute.

Warner v. *New Orleans,* 167 U. S. 467 and the same case upon a second appeal, *New Orleans* v. *Warner,* 175 U. S. 120, presents the ordinary case of a suit by a holder of warrants issued to anticipate the collection of and payable out of assessments levied against property to cover the cost of a drainage project. It is fundamental that in such cases the municipality is a trustee of the assessments when collected for the purpose of satisfying to the limits of the fund the direct contractual obligations to the holders of the warrants issued by the municipality. In the case at bar there exists no contractual obligation direct or otherwise between the City of Chicago and the plaintiffs.

The case upon which petitioners relied very heavily below and discussed and cited repeatedly in their petition and brief here is *Attorney General* v. *Corporation of Dublin,* 1 Bligh, New Reports, House of Lords, 312. This case is clearly of no value in determining the issues involved herein. It appears from the lengthy report of this case that pursuant to statute the Corporation of Dublin was given the right to charge land owners fixed annual water rates or rents. The corporation was empowered to borrow money and to pledge the rents for repayment of the money. Provision was made in a subsequent statute for further borrowings and for the setting up of a sinking fund to pay off all loans. Apparently when all monies were repaid the levy of water rates was to cease (see pp. 339, 348-349). Upon this state of facts it is not surprising that the court held that the land owners who paid the water rates were entitled to an accounting upon a specific showing in their complaint that the officials of Dublin were not applying the funds in liquidation of the debt as they were bound by law to do. Unlike the plaintiffs in this case the property owners were direct contributors to the fund and

were vitally interested in the disbursements made because upon extinction of the debt the water rates would cease. We fail to see the remotest analogy to the instant case. Neither by direct contribution nor by contract have plaintiffs established any interest in the fund, nor can they show how their rights are affected in any way by the disbursement of the monies in the traction fund.

A third point asserted by petitioners at page 39 of their brief, is a reiteration of the assertion that the defendants are active trustees of an express trust and that the plaintiffs are beneficiaries of that trust. The cases cited on pages 39 and 40 appear woefully insufficient to support this point or strangely irrelevant. *Altschuler* v. *Chicago City Bank & Trust Co.*, 380 Ill. 137, 43 N. E. (2) 673, involved an express written trust agreement, the beneficiaries being the holders of beneficial interests and the trustee being the holder of the title to real estate acquired by foreclosure for the benefit of the bondholders. We can have no quarrel with the holding of the court that the defendant was an active trustee under those circumstances. Any other holding would have been strange indeed. Any similarity between that case and the case at bar escapes our careful attention.

Hall v. *State of Wisconsin*, 103 U. S. 105, holding that a contract between officials of the state and private persons is binding upon the state is clearly not in point. The same comment applies to *Wall* v. *Chicago Park District*, 378 Ill. 81. In the first place no contract exists between the City of Chicago and the plaintiffs herein and secondly there is no question of contractual impairment of a contract by reason of any act of the legislature of the state or of the City Council of the City of Chicago.

A fourth point made by the plaintiffs, at page 38 of their brief, is that any beneficiary who is named or described in a contract or trust agreement or who makes contributions to a common fund may sue to enforce the benefit whether or not he knew at the time about the transaction upon whose occurrence the language of the trust agreement vests in him the benefit and that by payment of two cents or more excess fare for each ride each party became an original party in privity in this street railway trust.

The difficulty with this assertion is that it is not based upon the facts in this case but proceeds upon the unfounded assumption of legal principles upon the facts which are present in the case. The first fallacious assumption of fact is that the case involves a beneficiary who is named or described in a contract or trust agreement. The plaintiffs cannot point to any place in the two paragraphs of the franchise ordinances which are involved herein where the plaintiffs are named or described. The second fallacious assumption of fact is that the plaintiffs have made contributions to a common fund. As we have already pointed out, plaintiffs did not make any contributions to this fund. They merely paid fares to the traction companies and the traction companies pursuant to their agreement with the City of Chicago paid as compensation for the use of the streets the monies set aside in the traction fund. The third fallacious assumption of fact is that the plaintiffs paid two cents or more excess fare for each ride. The rate of fare of the Chicago Surface Lines is legally fixed by order of the Illinois Commerce Commission and it cannot be argued with any plausibility that any fare legally established by law is excessive to any extent. Furthermore there is an inherent fallacy of law in the

assertion that by the payment of the alleged excess fare, plaintiffs acquired a right to follow those fares into the hands of creditors of the public utility to whom monies were paid in fulfillment of a contractual obligation. It is so elementary as to require the citation of no authority that a patron of a public utility who has paid an illegally exacted charge is limited to a suit against the utility to recover the illegal charge.

The cases which the plaintiffs cite presumably in support of this point, which we have just dissected, and which is self-destructive, appear on page 38 of the petitioners' brief. All of these cases announce the indisputable principle that a third party for whose benefit a contract is made may sue to enforce the contract. None of these cases presents facts at all similar to the case at bar and do not in any way support the premise upon which the plaintiffs' case rests. The contract ordinance does not mention the car riders expressly or inferentially and does not purport to be for their benefit.

A fifth point made by plaintiffs at page 39 of their brief, asserts constitutional rights of the plaintiffs and the cases cited in support of the point also consider constitutional questions. We have carefully read the cases cited and cannot discover their relevance to the issues at bar.

There is here involved neither an express trust in favor of plaintiffs nor an impairment by legislation of a contract between the plaintiffs and the defendants, nor a taking of plaintiffs' property by exercise of the power of eminent domain. We believe that any detailed discussion of these cases would be an imposition upon the court.

B.

The cases cited by plaintiffs to establish their right to maintain a class suit deal with situations where the plaintiffs owned a trust fund in common with others and therefore are not applicable to the case at bar.

Plaintiffs cite a number of cases regarding the right of persons to bring representative suits on behalf of themselves and other beneficiaries to a common trust fund (page 42). We do not dispute the holdings in these cases wherein trust funds were unquestionably involved and where the plaintiffs were unquestionably members of the class of beneficiaries. However, plaintiffs could have more profitably devoted their energies in an attempt to prove the essential premise that they are beneficiaries of the traction fund. It is to be observed that nowhere do they claim that they are entitled to receive any portion of that fund. Under no circumstances is the city required to pay to the car riders or to any other group of persons any portion of the traction fund. That fund is to be expended for the purposes specified in the ordinance. That is the limit of the duties of the city. In all the cases upholding the right to bring a representative suit the plaintiffs are suing to recover monies from the trust fund which trust fund is insufficient to pay all claims against it or to enjoin the disbursement of monies from a fund where wrongful disbursement will ultimately result in the imposition of a liability upon the plaintiffs to replenish that fund or other funds. The case at bar does not even remotely bear any resemblance to the usual class suit.

We believe that it is unnecessary to burden the court with a discussion of the right of the plaintiffs to bring a

representative suit because that question cannot possibly arise unless the plaintiffs have first established an interest in the fund and a right to bring an action on their own behalf. This, we submit the plaintiffs have wholly failed to establish.

C.

The motion of the plaintiffs for relief pendente lite was premature particularly with respect to an allowance for attorneys' fees.

Plaintiffs filed a blanket motion for the granting of the special relief *pendente lite* asked for by several of the prayers in the complaint. (Tr. 101.) Prayers for relief are found at pages 61 to 65 of the transcript. It is not entirely clear from reading these prayers which are considered by the plaintiffs as relief *pendente lite.* We presume that these embrace the temporary injunction, discovery and "such advance sums of money as the court may deem necessary, to enable the plaintiffs and their counsel, to make adequate searches and investigations and preparation for trial, and to have the assistance and advice of auditors, before the hearing of this cause." (Tr. 62, 64.) The trial court did not specifically deny this motion. The motion automatically fell when the court sustained the defendants' motion to dismiss the complaint. While it is doubtful whether or not the matter is properly before this court for review at this time since the trial court did not pass upon the motion for relief *pendente lite,* we shall undertake to discuss this motion for the enlightenment of the court since the petitioners have raised the point (page 45).

The three cases which plaintiffs cite in support of their point that the plaintiffs should have relief *pendente lite* are not very helpful.

The relevancy of *Sprague* v. *Ticonic National Bank,* 307 U. S. 161 on the point of relief *pendente lite* escapes us.

Warren v. *Palmer,* 310 U. S. 132 relates to the determination of a lien against property being administered by the court and does not appear to be relevant upon the facts. Apparently the case is cited because of the language of the court that courts having custody of property have the power to require that expenses which "have contributed either to the preservation or creation of the fund in its custody shall be paid before a general distribution among those entitled to receive it." There is no disputing that principle. However, that language does not support the plaintiffs' contention that they are entitled to those expenses *pendente lite* before they have brought the fund into the custody of the court. We will shortly demonstrate that until the fund is brought into court, there is no jurisdiction to award attorneys' fees or expenses incurred in creating the fund.

Board of Commissioners of Vanderburgh County v. *Sanders,* 30 N. E. (2) 713 bears upon the question of relief *pendente lite* only in so far as it relates to an order upon the defendants to furnish the clerk of the court a list of persons who had paid building permit fees and the amount of fees paid by them, the recovery of those fees being the object of the suit. We do not question that if plaintiffs in this case have the right to maintain the present action, they will be entitled to discovery under the Federal Rules of Civil Procedure by appropriate and specific motions. (Rule 33—Interrogatories to Parties; Rule 34—Discovery and Production of Documents; Rule 36—Request for Ad-

mission; and Rule 37—Refusal to Make Discovery: Consequences.) If it was the intention of plaintiffs to obtain such relief *pendente lite* by their blanket motion, we submit that the motion was both improper and premature. Reasonably the plaintiffs must await the answer of the defendants to determine what information the plaintiffs desire that is not furnished by the answer of the defendants and then proceed by appropriate specific motions under the above cited rules. These specific motions could then be intelligently considered by the trial court. A vague motion for relief *pendente lite* without specifying what relief is requested presents nothing upon which the trial court can pass and cannot be regarded as a proper procedure under the rules.

In so far as the motion relates to an allowance of attorneys' fees and expenses of conducting litigation, it is manifestly premature. *People* v. *Holten,* 304 Ill. 394 squarely decides that point. In that case a taxpayer's suit was brought to recover from the collector of the town of East St. Louis certain taxes collected by him. The trial court dismissed the complaint. Upon appeal to the Supreme Court the decree of dismissal was reversed and the cause remanded. Upon remandment and before any other proceedings were had the attorney for plaintiffs filed a petition for allowance of fees and for a lien upon the fund when collected. The petition for fees was dismissed and an appeal was taken to the Supreme Court. The action of the trial court was affirmed, the Supreme Court holding that until successful termination of the suit and the bringing of the fund into the custody of the court there cannot be an allowance of fees (page 399):

> "Had there been a judgment or decree recovering this fund there would be much force in counsel's argument. A court of equity should do all in its power

to reasonably compensate those who seek to protect the public by compelling the return of public funds. There is no provision in equity, however, permitting a court, in the exercise of equitable powers, to declare an allowance of fees and the payment of them out of a fund of this character before the fund comes under the control of the court. There has been no judgment or decree rendered in the main case finding any amount due from Holten and his bondsmen. It was held in the *Holten* case that a right of recovery existed by the action of the tax-payers; that on the record there made Holten and his bondsmen were shown to be liable; that the municipalities had no authority to settle the claims with Holten and his bondsmen as was attempted to be done, and that therefore it was error to dismiss the bill. This does not amount to a judgment or decree finding an amount due. The case was remanded without directions. This opened the case for pleading, if desired. (*Green Lumber Co.* v. *Nutriment Co.*, 224 Ill. 234.) We are unable to say now that the circuit court should, on remandment, have entered a judgment or decree finding an amount due. There is no such fund at this time in the control of the court from which an allowance of reasonable attorney's fees could be made."

The federal rule is in accord with the foregoing principles. In *Buell* v. *Kanawha Lumber Corp.*, 201 Fed. 762 the court considered the question of allowance of attorneys' fees by courts of equity from a fund brought into court through the efforts of representatives of a class. While the decision is that of a district court, it is so painstaking and scholarly that we have no hesitation in submitting it to the court as sound authority. In its opinion, the court said, page 769:

"In America no distinction as between solicitors and barristers existing, the doctrine has been extended so as to include all the fees and expenses reasonably due by the successful litigant to his counsel, and the rule is established that where one goes into a court of

equity, and takes the risk of litigation on himself, and successfully creates or preserves or protects a fund to a share in which others are entitled, those others will not be allowed to lie back and share the results of these successful labors without contributing their due share, and a court of equity by an equitable extension of the English principle has required the payment out of the fund (before distribution) of the reasonable costs and expenses, including the reasonable counsel fees of the complainant whose diligence created or preserved the fund for distribution. If the complainant had been unsuccessful, and no fund had been created, he would have had to undergo the fate of the unsuccessful litigant in any other proceeding; that is, to pay the costs and expenses himself. That is the burden and risk that every litigant takes when he enters a court of justice. If unsuccessful, he must pay the costs of the court and also his own counsel fees. No man will be compelled to pay that which he did not expressly or impliedly contract under such circumstances to pay, and, if the complainant be unsuccessful, he cannot call upon others who did not believe in the merit of the claim, or did not care to undertake the risk of litigation, to pay any part of these expenses. He must bear them all himself. So, in any court of equity in the United States, where the complainant fails in his application, he has to pay all the costs of court, including the fees of the officers of the court, and of the masters and examiners as well as his own counsel fees. If successful, and through his efforts a fund has been created and protected or preserved, the court will under the principle of requiring equity to be done by those who share in these results require payment of all proper expenses out of the fund, if any fund there be within the court applicable to them."

The foregoing case has been cited with approval and quoted from by many courts of review. Some of these are: *Carbon Steel Co.* v. *Slayback,* 31 Fed. (2) 702 (C. C. A. Fourth Circuit); *Becht* v. *Miller,* 279 Mich. 629; 273 N. W. 297; *In re Lear's Estate,* 204 Ia. 346; 312 N. W. 244; and

Blacker v. *Kitchen Brothers Hotel Company,* 133 Neb. 66; 273 N. W. 838.

In the last cited case the syllabus by the court reads:

> "3. But allowances for attorneys' fees and expenses in such cases [representative suits] can only be made after the services have been rendered and a determination made that they were of direct and substantial benefit to other members of the class who are alleged to have benefited therefrom."

The foregoing authorities are so conclusive on the point that we will not further belabor it. There is no authority in law or reason for compelling a defendant *pendente lite* to finance litigation against him. All that can reasonably be expected is that after the plaintiffs have successfully maintained and terminated their action and have established the liability of the defendant, they are entitled to recover the expenses out of the common fund which their efforts have recovered for the class of plaintiffs represented.

D.

All of the expenditures made or proposed to be made which are specifically described in the complaint are within the purposes prescribed by the franchise ordinances.

While we feel that the principle reason for dismissing the complaint in this case is that the plaintiffs lack an interest in the fund, the complaint is also fatally defective in that it wholly fails to make out a case on the supposed misuse of the traction fund. The brief of petitioners does not favor us with an analysis of the allegations charging the defendants with unlawful diversion of the moneys in the traction fund to demonstrate why the expenditures made or contemplated are in violation of the provisions of the franchise ordinances.

An examination of that portion of the complaint alleging the supposed breaches of trust (Tr. pp. 19-45) discloses that it is replete with vague conclusions of law and fact which are clearly improper bases for the complaint. The specific allegations relating to definite expenditures and proposed expenditures reveal that those expenditures were wholly proper under the provisions of the franchise ordinances as construed by the Illinois Supreme Court in *Barsaloux* v. *City of Chicago,* 245 Ill. 598 and *People* v. *City of Chicago,* 349 Ill. 304. We have discussed these cases earlier in the brief and have pointed out that the court in these cases has held that the traction fund may properly be used not only for the purchase and construction of surface, elevated and underground street railways, but also for preliminary and incidental work in connection with such purchase and construction. The expenditures complained of specifically in the complaint clearly fall within the scope of permissible expenditures, namely, payment to a title company for a title search for proposed street widening projects to accommodate a subway (Tr. 20), charges in connection with studies and preparation of plans for construction of subways and franchise ordinances providing for acquisition of street railways (Tr. 20-24), expenses incidental to construction of subways and acquisition of street railways (Tr. 24-25), expenses of submitting to referendum a proposed comprehensive traction ordinance (Tr. 25), and proposed use of the traction fund under the provisions of the comprehensive traction ordinance dated June 19, 1941 (Tr. 26-29). With respect to the last item, *People* v. *City of Chicago,* 349 Ill. 304, has squarely upheld the use of the traction fund under the comprehensive traction ordinance of 1930, the provisions of which are practically identical

with the comprehensive traction ordinance of 1941 so far as it relates to the use of the traction fund.

The foregoing are all of the specific charges contained in the complaint and which are proper to consider in determining the sufficiency of the complaint. The balance of the charges of supposed violations of the trust (Tr. 30-45) are composed of general allegations, irrelevant communications, irrelevant dissertations on political history, aldermanic statements, a letter to the editor of the Chicago Daily News from a car rider (Tr. 44), and like incompetent matters.

Even if the plaintiffs did have an interest in the traction fund, we submit that the complaint does not state a good cause of action upon the theory of misuse of the moneys in that fund.

Conclusion.

It seems obvious that the named plaintiffs, residing in five different states other than Illinois cannot possibly possess a *bona fide* interest in the Traction Fund of the City of Chicago. It is nothing short of preposterous that these six non-residents spread all over the country should spontaneously and simultaneously conceive the idea of filing a suit on behalf of the millions of resident car riders purporting to protect them from alleged mismanagement of the Traction Fund. The conclusion is irresistible that the present suit was conceived and engineered by the attorney for the plaintiffs with the purpose in mind of manufacturing some basis for a claim for attorneys' fees in the remote contingency of success in proving the alleged misappropriation. We believe we are justified in making the assertion that the complaint was not filed in good faith. That fact ought to be manifest from the complaint itself.

Aside from having no practical interest, the named plaintiffs have no legal interest in the Traction Fund, as we have demonstrated in our brief. The judgment of the District Court and the affirmance thereof by the Circuit Court of Appeals were completely warranted. It is respectfully submitted that the Petition for Certiorari be denied.

Respectfully submitted,

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